

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-221319

DATE: April 3, 1986

MATTER OF: Aqua-Chem, Incorporated

DIGEST:

1. Protest that agency improperly eliminated protester's proposal for a cost-reimbursement contract to design and manufacture a resuscitation fluids production and reconstitution system from the competitive range based on design, a criterion not in the solicitation, is denied where evaluation factors specifically state that design will be evaluated. Moreover, fact that protester's offered system might meet the government's functional need does not preclude rejecting the offer based on inappropriate design, since the agency has no legal obligation to pay the firm on a cost-reimbursement basis to attempt a redesign that might meet the government's needs in that respect.
2. Protest that source selection chairman was biased in favor of another offeror is denied where record does not indicate that this official influenced the remaining members evaluating the protester's proposal.
3. Protest that members of the technical evaluation team were not qualified to evaluate proposals is denied where there is no evidence of fraud, conflict of interest or actual bias.

Aqua-Chem, Inc., protests the exclusion of its proposal from the competitive range under Department of the Army request for proposals (RFP) No. DAMD17-85-R-0039.

We deny the protest.

The RFP was issued on February 26, 1985, to procure a resuscitation fluids production and reconstitution system (REFLUPS)^{1/} for use by the Army, the Navy and the Air Force

^{1/} This system is to be used to produce sterile water from a potable water source and mix the water with prepackaged concentrate additives for injections.

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for medical treatment in the field during combat. The system was to be developed and produced in three phases.

The RFP in issue involves the first two phases of the project, and the present protest concerns the competition under phase I. During phase I, one or more contractors were to design, document, manufacture, test and deliver 10 Advanced Development Models (ADM) under a cost-reimbursement arrangement. Based on the results of government testing, the government, in phase II, could order 10 Engineering Development Models from the contractor (or contractors) with the best ADM, again through a cost-reimbursement arrangement. Phase III will involve a fixed-price contract with the offeror whose product is selected under phase II.

The RFP set out four evaluation factors: technical approach, worth 50 percent; corporate experience, 30 percent; management, 10 percent; and personnel and facilities, 10 percent. Each factor had subfactors, which were to be scored on a scale from 0 to 100 points. A subfactor score of 90 to 100 meant that the offeror met all requirements and exceeded some; a score of 75 to 89 meant that the firm met all requirements; and a score of 60 to 74 meant that the offeror met most of them but that there were minor discrepancies relating to mandatory requirements. Scores of 30 to 59 and 0 to 29 were marginal and unacceptable subfactor scores, respectively.

On April 12, 1985, the closing date for the receipt of initial proposals, the Army received four offers. These offers were evaluated by a source selection board (SSB), and the proposals submitted by Aqua-Chem and Sterimatics were considered technically acceptable.

By letter of June 11, the Army advised Aqua-Chem that its proposal was within the competitive range, but that the SSB was concerned with a number of aspects of the firm's unit. The letter posed a number of precise technical questions about the system, which reflected the SSB's overall concern, as stated in the initial evaluation summary, that the system, although technically acceptable, was "too large, bulky and complicated, not suitable for either ship-board or field use." In this respect, the RFP required that the REFLUPS be self-contained, compact, portable and automated in order to simplify operation and maintenance; that it be small and light enough for two people to assemble, disassemble and transport; that it be capable of operational use within 2 hours after unpacking and positioning in an operational site; and that it "produce $75 \pm 20\%$ liters of solution per hour."

Following the receipt of Aqua-Chem's revised proposal and its visit to Aqua-Chem's facilities, the SSB notified Aqua-Chem that there still were a number of problem areas in its proposal. The firm was advised that, for example, while the system's size and weight now literally met the RFP's specification, the unit still was too large to conform to the two-person portability requirement, so that the system's size and weight still had to be reduced. The letter further stated that the reconstitution system, as presented in the proposal, did not evidence meeting the performance requirement for production of 75 ($\pm 20\%$) liters of solution per hour; that the mechanical complexity associated with mixing fluids had to be lessened; and that the system depended too much on operator input.

Aqua-Chem responded to these and other concerns in a revised proposal dated July 26, 1985. After reviewing it, however, the technical panel determined that Aqua-Chem's proposal should be eliminated from the competitive range. Among other things, the SSB found that the system proposed by Aqua-Chem still did not conform to the requirement for a maximum weight of 74 pounds for any REFLUPS component, and that the transport boxes, designed for forklift handling, also did not meet the RFP requirements. The SSB concluded that the "mechanical design complexity [was] overwhelming, and simply did not meet the requirement for a self contained compact, portable unit." The SSB further determined that it was questionable whether the proposed REFLUPS will be operational within 2 hours after unpacking and positioning in an operational site, and that, because the system required that a medic install empty bags, remove and label filled bags, and, under the stress of combat conditions, perform the required tests accurately, it was uncertain whether the required production rate of $75 \pm 20\%$ liters per hour would be met. In summary, the SSB stated that "the Aqua-Chem proposed REFLUPS is large, bulky, complex, and well above weight limitations." On December 4, the Army informed Aqua-Chem that its proposal would no longer be considered for award. Aqua-Chem filed its protest with this Office on December 16.

Aqua-Chem protests that its proposal was eliminated from the competitive range based on the design details of its system. Aqua-Chem asserts that the critical requirement of the RFP is the production of sterile drug products with absolute assurance of quality. The crux of the protester's argument is that so long as an offeror proposed to meet that

critical requirement based on an acceptable technical concept, the firm was entitled to a contract under which to develop and refine the specific design details needed to implement that concept. Aqua-Chem asserts that its system in fact meets the RFP's transportability and operational requirements and will fill 75 \pm 20% liter IV bags per hour. Finally, the protester complains that removing Aqua-Chem from the competitive range leaves only one offeror in the competition, and that since only phase I contractors are eligible for phases II and III, the effect of the Army's action is to put Stermatics in a sole-source position with respect to the REFLUPS program.

Contracting officials enjoy a reasonable degree of discretion in the evaluation of proposals for acceptability, and our Office will not substitute its judgment for that of the procuring agency by making an independent determination unless the agency's action is shown to be unreasonable. Thus, we will not disturb an agency's determination of whether a proposal is in the competitive range absent clear evidence that the determination lacks a reasonable basis. Essex-Electro Engineers, Inc., et al., B-211053.2 et al., Jan. 17, 1984, 84-1 C.P.D. ¶ 74.

Insofar as Aqua-Chem asserts that its proposal should not have been evaluated based on the design details it proposed, the RFP's evaluation section stated that the purpose of the technical evaluation is to determine the offerors most likely to proceed in developing the REFLUPS to the specifications/statement of work. As noted above, these specifications clearly inform offerors that the proposed system must be compact and portable. The evaluation factor for technical approach was weighted significantly more than the other factors, and the first subfactor to be evaluated pursuant to the factor was adequacy of the proposed system's design. Thus, we cannot agree with Aqua-Chem that the SSB improperly considered design generally or size specifically in evaluating Aqua-Chem's proposed system.

Nor can we question the SSB's decision to eliminate Aqua-Chem's proposal from the competitive range. Aqua-Chem clearly was informed by the Army's July 15 letter that the SSB was concerned with the configuration of its system and with whether the system could fill 75 \pm 20% 1 liter IV bags per hour and was specifically requested to address these concerns in a revised proposal. As to configuration, although in its revised proposal Aqua-Chem proposed to redesign the REFLUPS so that it could be transported in

sections by two people, Aqua-Chem, in its protest, notably does not dispute the Army's finding that its proposed system is large and bulky. Instead, Aqua-Chem insists that because its system meets the functional requirements, it should be awarded a contract and should be permitted to work out the specific design details during contract performance. We do not agree with Aqua-Chem, however, that the Army had a legal obligation to pay the firm on a cost-reimbursement basis so the firm would have a chance to develop a design that would meet all the agency's requirements.

Regarding whether Aqua-Chem's proposed system was capable of delivering 75 \pm 20% 1 liter bags per hour, Aqua-Chem's revised proposal describes the system in detail and alleges that the system will meet this requirement. We have reviewed the offer, however, and the fact is that Aqua-Chem does not go the further step of explaining how the system will meet the requirement. We simply cannot conclude that the SSB unreasonably determined that Aqua-Chem's system would not meet its need.

We also disagree with Aqua-Chem's contention that the elimination of its proposal converted the competition into a sole-source award to Sterimatics. Although the evaluation of proposals left only Sterimatics eligible to receive a contract award for all three phases of REFLUPS development, the Army issued a competitive RFP to cover phases I and II and received and evaluated four offers. Thus, it clearly conducted the procurement on a competitive basis. See Johnson Enterprises, Inc., B-213311, July 24, 1984, 84-2 C.P.D. ¶ 98. Once the Army evaluated the offers and determined that only Sterimatics would meet its needs, a decision we have no reason to question based on the present protest, the Army was not obligated to compromise its needs to create competition. See Corvus Systems, Inc., B-211082.3, Feb. 11, 1985, 85-1 C.P.D. ¶ 173.

Aqua-Chem also protests that the chairman of the SSB was biased in favor of Sterimatics, and that the members of the SSB were not qualified to evaluate proposals for the REFLUPS. Aqua-Chem bases the allegation of bias on the fact that, before the RFP was issued, the chairman sought to have a sole-source award made to Sterimatics and that after the competition was announced, the chairman used a REFLUPS prototype developed by Sterimatics at a special project review intended to inform the services of developments in military

medicine. Insofar as the qualifications of the board members are concerned, Aqua-Chem alleges that no member had the necessary expertise in pharmacology/resuscitative fluid systems to understand the requirements of the RFP.

The Army responds that the chairman of the SSB has been interested in this area of water development for some time and that he was interested in Sterimatics' system. The Army denies, however, that the chairman was biased. The Army also asserts that the members of the SSB were qualified to evaluate the proposals.

Where bias is alleged, the protester must affirmatively prove its case. In this regard, we have held that the mere appearance of, or opportunity for, bias is not a sufficient basis for questioning a contract award, but that a protester must provide "hard facts" showing actual bias. Hudson Valley Medical Professional Review Organization, B-212618, Oct. 2, 1984, 84-2 C.P.D. ¶ 378. Further, even if it is assumed that the source selection official was biased in favor of Sterimatics, it must be shown that this bias translated into action which affected Aqua-Chem's competitive position. Nuclear Assurance Corp., B-216076, Jan. 24, 1985, 85-1 C.P.D. ¶ 94. Here, there is no indication in the record that the chairman tried to influence any member of the SSB to favor Sterimatics. Notably, our review of the individual evaluator's scores of Aqua-Chem's proposal, which were arrived at independently, does not indicate any favoritism toward Sterimatics.

Finally, our Office will not become involved in appraising the qualifications of contracting personnel involved in the technical evaluation of offers absent a showing of fraud, conflict of interest or actual bias on the part of evaluators. Petro Engineering, Inc., B-218255.2, June 12, 1985, 85-1 C.P.D. ¶ 677. Since none of these factors is present, we will not consider Aqua-Chem's challenge to the technical expertise of the SSB.

The protest is denied.

for *Seymour S. Frow*
Harry R. Van Cleve
General Counsel